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FIRST APPEAL NO. 1408/84 WITH FIRST APPEAL NO. 1409/84
WITH FIRST APPEAL NO. 1413/84

Date of decision: 11.7.1995

For Approval and Signature:

Hon'ble Mr. Justice : R.K.Abichandani

1. Whether Reporters of Local Papers may be allowed to see the judgement?

2. To be referred to the Reporte....

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3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

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Appearance:

F.A No.1408/84 and F.A 1409/84

Mr. Ajay Mehta, Advocate for the appellants.
Mr. Akshay H.Mehta, Advocate for respondent No.1
Mr.H.B.Shah, Advocate for respondent Nos. 2 and 3.

F.A No. 1413/84

Mr. Ajay Mehta, Advocate for the appellant
Mr. J.T.Trivedi, Advocate for respondent No.1
Respondent Nos. 2 and 3 served.
Mr. H.B.Shah, Advocate for respondent Nos. 4 and 5.

Coram:R.K.Abichandani,J.
Date :11.7.1995

ORAL JUDGEMENT

These three appeals have been heard together at the instance of the learned Counsel for both the sides as they arise from the common award of the Motor Accident Claims Tribunal (Main), Bharuch made on 31.3.1984 in Motor Accident Claim petitions Nos. 79, 80 and 210 of 1982. It is stated that the appeals which were filed against the common award in Motor Accident Claim Petition Nos. 81, 82 and 83 of 1982 were summarily dismissed.

The accident took place on 12.12.1981 at about 1.30AM when the Metador tempo bearing registration No.GJG 5586 carrying the claimants for going to village Fagvel for pilgrimmage turned turtle near village Vavdi. According to the claimants the vehicle which was driven by Sikkander, the respondent No.1 who is son of the owner of the vehicle Isap, the respondent No.2 had turned turtle because of rash and negligent driving of Sikkander. It was the case of the claimants that they had travelled in the said vehicle on hire. In MACP No. 79/82 from which First Appeal No. 1408/84 arises, the claim put forth was for Rs. 1 lac while the Tribunal awarded a sum of Rs. 15,000/-. In MACP No. 80/82 from which First Appeal No. 1409/84 arises, a sum of Rs. 9,600/- was awarded as against the claim of Rs. 50,000/- made therein. The Tribunal awarded a sum of Rs. 7,700/- to the claimant of MACP No. 210/82 from which First Appeal No. 1413/84 arises against the claim of Rs. 25,000/-.

The Insurance Company, appellant in all these three appeals has taken up the contention that it is not liable for any amount because the claimants were travelling in the vehicle on hire and as per the exclusionary clause in the Policy, the Policy did not cover the use for hire or reward. As the said private vehicle was covered for insurance only if it was used for social, domestic and pleasant purposes and for the insurers' business, the Insurance Company, according to it, was not liable to pay compensation in respect of accident to any of the claimants. The Tribunal while holding that there was evidence to show that the insurer may not have become liable held against the insurer on the ground that specific defence was not taken in the written statement.

The learned Counsel appearing for the Insurance Company contended that the evidence on record established that the claimants were using the vehicle on hire, that there was an exclusionary term in the Policy making it clear that it did not cover use of the vehicle for hire, that no permit was obtained for using the said vehicle as a commercial vehicle as required by Section 42 of the Motor Vehicles Act, 1939 and that the owner of the vehicle was aware that the vehicle was being used

for hire. He therefore, submitted that the Insurance Company was not at all liable to pay the compensation under the impugned award to any of these claimants.

The learned Counsel appearing for the claimants have submitted that in order to successfully disclaim it's liability on the grounds mentioned in Section 96(2)(b) of the said Act the insurer is required to establish that the vehicle was used by the insured or at his instance in breach of specific conditions including the condition that passengers for hire or reward were not to be carried in the vehicle. It was submitted that if this was done without the knowledge of the insured by the driver's act or omission, the insurer would still be liable to indemnify the insured. Reliance was placed in support of this submission on the decision of the Full Bench of this Court in New India Assurance Company Limited Vs. Kamlaben and ors., reported in XXXIV(1) GLR 779.

Section 95 of the said Act of 1939 dealt with requirement of Policies and limits of liabilities. Under the said provision it was mandatory that a Policy of Insurance must comply with the requirements enumerated therein. Accordingly, as provided by Section 95(1)(b)(ii), a Policy of Insurance must be a Policy which insures person or classes of person specified in the Policy to the extent specified in sub-section (2) against the death or or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of the vehicle in a public place. As laid down in the proviso (ii) to Section 95(1)(b), a Policy was not required to cover liability in respect of the death of or bodily injury to persons being carried in or upon the vehicle at the time of the occurence of the event out of which the claim arises except where the vehicle is a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment. Therefore, proviso (ii) does not affect the statutory liability of the insurer in respect of a public service vehicle as provided for under Section 95(1)(b)(ii) of the said Act. The expression `public service vehicle' in clause (ii) of Section 95(1)(b) is to be read in context of its definition in Section 2 (25) of the said Act and accordingly, it would inter-alia mean any motor vehicle used for the carriage of passengers for hire or reward. The words `any motor vehicle' would include even a private motor vehicle and therefore, when a private motor vehicle is actually used for the carriage of passengers for hire or reward it becomes a public service vehicle at that time, even if no permit was obtained in respect thereof under Section 42 of the said Act. Therefore, the contention that as no permit was obtained under Section 42 of the said Act in respect of the said vehicle for its use as transport vehicle, the Insurance Company would not be liable, cannot be accepted. In such cases, the Insurance

Company would still be liable by virtue of the provisions of Section 95(1)(b)(ii) to the extent of liability indicated under sub-section (2) of Section 95. As provided by sub-section (2)(b)(ii) of Section 95, a Policy of Insurance shall cover any liability incurred in respect of any one accident upto a limit of 15,000 rupees for each individual passenger in respect of passengers carried for hire in such vehicle. However, in cases, where there is a specified condition in the Policy which excludes the use of the insured vehicle for the carriage of any passenger for hire or reward and the vehicle was in fact used in breach of such specified condition, the benefit of statutory insurance will not be available in respect of such passenger. This position emerges from the Full Bench decision of this Court in the case of New Inddia Assurance Company Limited Vs. Smt. Nathiben XXIII(1) G.L.R 411.

In New India Assurance Company Limited Vs. Smt. Nathiben (supra), the Full Bench in context of the provisions of Section 95 and 96 of the said Act held that the insurer, in order to successfully disclaim his liability will have to establish:- (1) that on the date of the contract of insurance, the insured vehicle was expressly or implicitly not covered by a permit to carry any passenger for hire or reward; (2) that there was a specific condition in the Policy which excluded the use of the insured vehicle for the carriage of any passenger for hire or reward and (3) that the vehicle was, in fact, used in breach of such specified condition on the occasion giving rise to the claim, by using of the carriage or the passenger thereof for hire or reward. If all these conditions are established by the insurer, the benefit of statutory insurance will not be available in respect of such passengers. The provisions of Sections 95 and 96 again came to be considered by another Full Bench of this Court in New India Assurance Company Limited Vs. Kamlaben, reported in XXXIV(1) G.L.R 779 in which the Full Bench, in addition to the three requirement enumerated by the earlier Full Bench in New India Assurance Company Vs. Nathiben (supra) which would enable the insurer to successfully disclaim his liability, added the fourth requirement by holding that in order to successfully disclaim his liability on the ground mentioned in Section 96(2) (b) of the said Act, the insurer has also to establish - "that the vehicle was used by the insured or at his instance in breach of specified conditions including a condition that in the goods vehicle passengers for hire or reward were not to be carried. If it is done without knowledge of the insurer by the driver's act or omission, the insurer would be liable to indemnify the insured."

Therefore, in cases where the insured has no knowledge about his driver having taken passengers for hire or reward, then notwithstanding the exclusionary clause contained in the

Policy, the insurer would be liable to indemnify the insured.

The learned Counsel appearing for the claimants heavily relied on this decision in support of their contention that the appellant Company would be liable despite the exclusionary clause in the Policy because the owner of the vehicle, who had insured it with the appellant Company, had no knowledge about the driver's conduct in taking the passengers for hire. The driver Sikkander who is respondent No.2 herein is admittedly son of respondent No.3 Isap who is the owner of the vehicle. Sikkander in his deposition at Exhibit 77 has in terms stated that he had taken the vehicle towards Fagvel with these passengers at the instance of his father. In his cross-examination, he has admitted that his father had two other trucks which were used for hire. Sikkander was hardly 21 years of age and when he admits that he had taken these passengers for pilgrimmage to Fagvel at the instance of his father in the said vehicle, it becomes abundantly clear that the insured had ample knowledge about the passengers being carried in the said vehicle by his son. The claimants have clearly deposed that the motor vehicle was hired for a sum of Rs. 400 and there is absolutely no reason to disbelieve this version and take a different view. Therefore, knowledge about the vehicle being used for taking passengers on hire is clearly attributable to the insured. In this view of the matter, the claimants cannot get the benefit of the judgement of the Full Bench in New India Assurance Company Ltd. Vs. Kamlaben (supra).

In the above view of the matter, the appellant Company has clearly established that all the requirements laid down in the above two Full Bench judgements have been established by it successfully to disclaim its liability under the impugned award made by the Tribunal in favour of all these claimants. The question of the liability of the insurance Company was directly covered under issue No.2 and the parties led their evidence on this dispute are fully aware of the fact that the insurance Company was disclaiming its liability. Therefore, the Tribunal committed an error in brushing aside the evidence led on the issue and discussed at length by it on the ground that the defence was not specifically raised by the insurer in its written statement.

All the three appeals are therefore, allowed by modifying the impugned award by setting it aside only to the limited extent that the appellant Insurance Company is directed to pay the amounts awarded to the above three claimants. There shall be no order as to costs in each of these matters.
